THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Shirley C. Robinsom, Administrative Law Judge

Case Number 13-ALJ-21-0235-AP

Kenneth Ray Anderson . . . . . Appellant,

vs.

South Carolina Department of Motor Vehicles and
Clemson University Police Department . . . . . Respondents

INITIAL BRIEF OF THE RESPONDENT

Linda Annette Grice
Assistant General Counsel
Philip S. Porter
Deputy General Counsel
Frank L. Valenta, Jr.
General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Facsimile: (803) 896-9901
Attorneys for the Respondents

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1. The hearing officer did not err in concluding as a matter of law that the Department met its burden of proof in establishing that the appellant was given a written copy and verbally informed of the rights enumerated in Section 56-5-2950.

2. The hearing officer did not err in concluding as a matter of law that the Department met its burden of proof in establishing that the appellant was lawfully arrested or detained for driving under the influence.

STATEMENT OF THE CASE

The Appellant was arrested on November 10, 2013 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Appellant was taken for a breath test, and upon refusal to submit to a breath, blood or urine test, was charged with violation of S.C. Code Ann. § 56-5-2950. As a result of his refusal, the primary investigating officer issued a written notice of suspension to the Appellant.

Pursuant to written notice to the parties, a hearing was held on March 27, 2013 at the Ronald Townsend Bldg., Main Street, Anderson, South Carolina. By Final Order and Decision dated May 20, 2013, the suspension of Appellant's driving license or driving privilege was sustained. Appellant timely filed a notice of appeal to the Administrative Law Court. By Order dated November 18, 2013, the ALC sustained the Appellant's suspension. This appeal followed.

ARGUMENT

1. THE HEARING OFFICER DID NOT ERR IN CONCLUDING AS A MATTER OF LAW THAT THE DEPARTMENT MET ITS BURDEN OF PROOF IN ESTABLISHING THAT THE APPELLANT WAS GIVEN A WRITTEN COPY AND VERBALLY INFORMED OF THE RIGHTS ENUMERATED IN SECTION 56-5-2950.

Appellant's assertion that the Hearing Officer erred in sustaining the Appellant's suspension because the Department failed to establish that he was given a written copy and verbally informed of the rights enumerated in Section 56-5-2950 has no merit. The Hearing Officer correctly found that the Appellant was advised verbally and in writing of his Advisement of Implied Consent Rights at the DataMaster breath test site.

Due to circumstances of the Appellant's behavior during the arrest, after being transported to the police jail, the breath test was conducted by the arresting officer's supervisor (OMVH Transcript p. 6). Sgt. McDonald was present during the test (OMVH Transcript p. 7). Based upon the uncontroverted testimony of Sgt. McDonald, it was established that the Appellant was advised verbally and in writing of his Implied Consent Rights and he refused to submit to the breath test as requested. Sgt. McDonald testified that the Appellant was read his implied consent rights and that he signed a copy of them. He was also read the test results which he also signed. Finally, Appellant signed the Notice of Suspension which was issued to him (OMVH Transcript p. 6). His testimony was not contradicted and there is nothing in the Record that is inconsistent with it. Moreover, Sgt. McDonald was neither cross-examined regarding this testimony nor otherwise impeached as a witness.

Absent any proof to the contrary, prima facie evidence is sufficient to establish that law enforcement complied with 56-5-2950 in administering the breath test. *See. State v. Parker*, 271

S.C. 159, 164, 245 S.E.2d 904, 906 (1978). Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish a fact in question unless rebutted. *Lacount v. Gen. Asbestos & Rubber Co.*, 184 S.C. 232, 240, 192 S.E. 262, 266 (1937). If the Department establishes a prima facie case and the motorist fails to present any evidence to rebut it, then judgment must go in the Department's favor.

The Appellant did not refute the testimony of the arresting officer. The only testimony before the Hearing Officer was that of the arresting officer, a law enforcement official whose testimony, absent some evidence of erroneous observation or deliberate misrepresentation is reliable. See e.g., *Mackey v, Montrym,* 443 U.S.1, 14 (1979). The hearing officer did not err in determining that the arresting officer's testimony provided substantial evidence of the facts stated and there was no need for corroboration. See e.g., *Elwood Constr. Co. v. Richards,* 265 S.C. 228, 234, 217 S.E.2d 769, 771 (1975); *Cheatham v. Gregory,* 313 S.E.2d 368, 370 (1984) ("A trier of fact must determine the weight of the testimony and the credibility of the witnesses, but may not arbitrarily disregard un-contradicted evidence of un-impeached witnesses which is not inherently incredible and not inconsistent with the facts on the record...) The Hearing Officer did not err in finding that the Department met its burden of proof in this matter.

2. THE HEARING OFFICER DID NOT ERR IN CONCLUDING AS A MATTER OF LAW THAT THE DEPARTMENT MET ITS BURDEN OF PROOF IN ESTABLISHING THAT THE APPELLANT WAS LAWFULLY ARRESTED OR DETAINED FOR DRIVING UNDER THE INFLUENCE.

In the instance case, the Hearing Officer correctly found and concluded as a matter of law that the Petitioner met its burden of proof (OMVH Final Order and Decision p. 7). The Appellant argues that the OMVH Hearing Officer erred because the Respondent did not have probable cause for the Appellant's arrest for driving under the influence and therefore, the arrest was not lawful. However, the record clearly supports the determinations made by the Hearing Officer as it establishes that there was sufficient evidence to establish a prima facie case for the arrest.

In the instance case, Sgt. McDonald testified that the Appellant was observed operating a golf cart on Highway 93, a primary state highway, after dark with seven occupants, some of whom had open containers (OMVH Trans p 05). Pursuant to S. C. Code Ann. Section 56-2-105, the use of a golf cart is restricted to secondary highways or streets and daylight hours only. The testimony of the officer established that there was "reasonable suspicion' to justify the stop. After making a traffic stop for the aforementioned traffic violations, the Appellant was administered field sobriety tests during the course of the investigatory stop. Sgt McDonald further testified that the Appellant performed poorly on the field sobriety tests and he determined that the Appellant was intoxicated and driving under the influence (OMVH Trans p. 6). He further testified that during the course of taking Appellant into custody, he began to resist and used several racial slurs. Subsequently, Appellant was also charged with resisting arrest and the arresting officer's supervisor decided to conduct the DataMaster breath test. The Sgt.'s testimony regarding the Appellant's performance on the field sobriety tests and his inappropriate behavior

during the arrest was sufficient to establish probable cause for the arrest for driving under the influence.

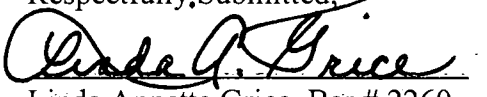
Probable cause has been defined as "a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent person, under the circumstances, to believe likewise." *Wortman v. Spartanburg*, 310 S.C. 1, 4 425 S.E.2d 18, 20 (1992). The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. *State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. Id. Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. Id. "Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005)

In determining whether probable cause exists, the facts know to the officer are evaluated together. In this case, the uncontroverted testimony of Sgt. McDonald was sufficient, as a whole, to establish that the Appellant was lawfully arrested for DUI. The Appellant offered no evidence which contradicted, or questioned the accuracy of the arresting officer's testimony. The Hearing Officer observed the witnesses and is in the best position to judge their demeanor and veracity and the evaluate the credibility of each witness' testimony. *See. Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). The Hearing Officer did not err in finding that there was probable cause for the Appellant's arrest for driving under the influence.

CONCLUSION

Based upon the above arguments, the Order of the Administrative Law Court should be affirmed.

Respectfully Submitted,



Linda Annette Grice, Bar # 2260
Assistant General Counsel
Linda.Grice@SCDMV.net
Philip S. Porter, Bar # 4526
Deputy General Counsel
Philip.Porter@SCDMV.net
Frank L. Valenta, Jr., Bar # 5682
General Counsel
Val.Valenta@SCDMV.net
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Facsimile: (803) 896-9901
Counsel for the Respondent

March 11, 2014

Blythewood, South Carolina

South Carolina Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

MV-17

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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